90-1488

Supreme Court, U.S.
FILED
MAR 20 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 20, 1991

QUESTIONS PRESENTED

1. Whether Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," is too vague and amorphous to create an individually enforceable right under 42 U.S.C. § 1983 ("Section 1983") in the complex area of child welfare.

2. Whether children living at home, who are not in foster care, have enforceable rights under Title IV-E of the AAA, which provides reimbursement for "foster care maintenance payments," when the state receives no federal Title IV-E funds to provide services to those children.

LIST OF PARTIES

The parties to the proceedings below were petitioners Sue Suter (and her predecessors Jess McDonald and Gordon Johnson), Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), and Gary T. Morgan, DCFS Guardianship Administrator, both sued in their official capacities. Respondents included Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Brandon W., and Amber B., individually and on behalf of all similarly situated individuals, by their next friend Patrick T. Murphy, Public Guardian of Cook County.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Sue Suter and Gary T. Morgan respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on October 29, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 917 F.2d 980 and is reprinted in the appendix hereto, *infra* p. 1a.

The opinion of the United States District Court for the Northern District of Illinois (Shadur, J.) on petitioners' motion to dismiss is reported at 726 F. Supp. 690 and is reprinted in the appendix hereto, *infra* p. 32a. The injunctions entered by the district court on March 2 and April 3, 1990, are unreported and are reprinted in the appendix hereto, *infra* pp. 51a-58a.

JURISDICTION

Respondents brought this action in the Northern District of Illinois under 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment to the Constitution and Title IV-E of the AAA, 42 U.S.C. §§ 670-679a. The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 2201, and 2202. The district court held a hearing on respondents' motion for a preliminary injunction in January 1989, but deferred ruling at that time. Petitioners then moved to dismiss respondents' complaint. On November 21, 1989, the district court granted petitioners' motion in part, dismissing respondents' constitutional claims but refusing to dismiss the statutory counts. (App. 50a). The district court entered a preliminary injunction on March 2, 1990 (App. 51a), and an order modifying that injunction to impose reporting requirements on April 3, 1990 (App. 57a).

Petitioners filed timely notices of appeal from the injunction orders on March 30 and April 5, 1990. Appellate jurisdiction was based on 28 U.S.C. § 1292(a)(1). In addition, petitioners asserted, and the Seventh Circuit exercised, pendent appellate jurisdiction over the district court's order denying in part petitioners' motion to dismiss. The Seventh Circuit exercised its jurisdiction to review the motion to dismiss ruling because the injunction turns on the validity of that order, and the ruling is interdependent with the injunction. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940) (court may hear appeal of motion to dismiss ruling in connection with injunction appeal).

On October 29, 1990, a sharply divided Seventh Circuit panel affirmed the district court. (App. 1a). Judge Cummings wrote the majority opinion, joined by Senior Judge Eschbach. Judge Manion filed a strongly worded dissent. Petitioners filed a petition for rehearing with suggestion for rehearing en banc on November 14, 1990. On December 20, 1990, the court denied that petition. (App. 31a).

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), provides, in pertinent part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> . . .
>
> (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

STATEMENT OF THE CASE

This case presents important issues concerning whether *Wilder v. Virginia Hospital Association,* 110 S. Ct. 2510 (1990), abrogated the careful limits on implication of enforceable rights from spending-clause statutes announced by this Court in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981). The majority opinion below holds that Section 671(a)(15) of the AAA, which requires that states make "reasonable efforts" to prevent foster care placements and reunify families, creates enforceable rights under Section 1983. That holding is flatly contrary to this Court's holding in *Pennhurst* that a vague statute cannot create enforceable rights. In addition, the majority holds that children residing at home may enforce Section 671(a)(15) despite the fact that the states receive no Title IV-E funding to serve those children, again deviating from *Pennhurst*'s mandate.

Respondents filed this action for declaratory and injunctive relief under Section 1983 on December 14, 1988, alleging that DCFS has violated the Fourteenth Amendment and Title IV-E

of the AAA by failing promptly to assign and reassign caseworkers to respondents' cases. Respondents represent two classes of children. Class A includes children who are or will be in the custody of DCFS pursuant to temporary custody orders entered by the Circuit Court of Cook County, Juvenile Division (the "Juvenile Court"), *and* children who remain in their own homes under orders of the Juvenile Court. Class B is a subclass of Class A and encompasses only those children in DCFS custody.

On the same day respondents filed their Complaint, they filed a preliminary injunction motion seeking (i) assignment of a caseworker to respondents' cases within 24 hours following the initial Juvenile Court order and (ii) continuous caseworker assignment thereafter. On January 17-19, 1989, the district court held a hearing on respondents' preliminary injunction motion. Petitioners presented evidence at the hearing of a Reorganization Plan that the Department had voluntarily instituted to ensure that caseworkers are assigned to cases promptly. The court deferred ruling on respondents' motion for several months.

Because petitioners believed respondents' Complaint lacked any *legal* foundation, petitioners moved under Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint for failure to state a claim upon which relief can be granted. On November 21, 1989, the district court granted petitioners' motion to dismiss respondents' constitutional claims, but refused to dismiss any of respondents' claims under the AAA. (App. 32a). Petitioners filed a motion to reconsider the court's ruling, which the court denied on December 7, 1989. However, in ruling on the motion to reconsider, the district judge orally clarified the November 21 Order, stating that the only remaining legal basis for respondents' claims was the "reasonable efforts" provision of the AAA, 42 U.S.C. § 671(a)(15).

Following additional discovery and briefing, on March 2, 1990, the court entered a preliminary injunction, which requires that DCFS assign a caseworker to all court cases within three working

days of the initial Juvenile Court order and that no case remain unassigned for more than three working days at any time thereafter. The order applies to all class members, including all children who remain at home under Juvenile Court orders. (App. 51a).

On respondents' motion to amend the preliminary injunction, the district court on April 3, 1990, modified the injunction to require that DCFS each week provide respondents with a list of newly assigned or reassigned cases, their assigned caseworkers and those workers' telephone numbers, and any previously assigned workers, for the stated purpose of monitoring petitioners' compliance with the March 2 Order. (App. 57a).

Petitioners filed timely notices of appeal from the March 2 and April 3 Orders and moved before the district court to stay both orders pending appeal to the Seventh Circuit. The district court denied that motion on April 9, 1990, and provided an explanation as to what "reasonable efforts" the court believed were required by Section 671(a)(15) of the AAA. The district court concluded that, in initiating voluntary efforts to improve case assignment procedures, the Department itself had defined what reasonable efforts were required by the AAA, and, since the Department's efforts were only 75 percent effective, petitioners had failed to exercise reasonable efforts.

After expedited briefing and oral argument, the Seventh Circuit entered an order on June 21, 1990, which was modified on June 27, 1990, partially remanding the case to the district court. The court of appeals instructed the district court to make factual findings as to the amount of delay in caseworker assignment and reassignment at the time the injunction issued. The district court made the requested findings based on submissions from the parties and issued its opinion on July 25, 1990.

On October 29, 1990, the Seventh Circuit, in a split decision, affirmed the district court's orders denying in part petitioners' motion to dismiss and granting respondents' motion for a prelimi-

nary injunction. (App. 1a). The majority opinion, written by Judge Cummings, holds that the "reasonable efforts" clause creates an enforceable right to reasonable efforts to prevent removal of children from their homes and to reunify children with their families. Moreover, the court extends that enforceable right not only to children in foster care, but also to children residing at home, for whom DCFS receives no federal funds under Title IV-E.

Judge Manion filed a vehement dissent, accusing the panel majority of "inventing rights which interfere with the foster care system" (App. 27a), and of allowing a narrow focus on *Wilder* to distract the court from "the more applicable legal standards and reasoning of *Pennhurst*" (App. 21a). The dissent warns that "[t]his opinion moves the court from its proper role as impartial arbiter . . . to that of a crisis administrator of child welfare." (App. 29a-30a). Judge Manion recognized that, by allowing any individual involved in the child welfare system to sue for "reasonable efforts," the majority vastly expands federal court intervention into state child welfare decision making, opening the door for an "avalanche" of individual cases for which the federal courts are unprepared and ill-suited. (App. 29a).

Petitioners filed a timely motion for rehearing with suggestion for rehearing en banc on November 13, 1990, which the court denied on December 20, 1990. (App. 31a).

REASONS FOR GRANTING THE WRIT

This appeal concerns the limits on the power of federal courts to impose massive new financial obligations on the states through implication of private rights of action from a vaguely worded federal statute. This Court considered that question most recently in *Wilder v. Virginia Hospital Association,* 110 S. Ct. 2510 (1990), and held that courts may create rights from congressional silence only after reviewing the statute, its legislative history, and the

implementing regulations to determine whether the statute is sufficiently mandatory and specific to evince a congressional intent to create privately enforceable rights.[1] The decision below analogizes to *Wilder*'s holding but fails to apply the test set out by this Court. By implicitly and incorrectly reading *Wilder* to abrogate the careful limits placed on Section 1983 by *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981), the Seventh Circuit has opened the federal courts to what the dissent aptly predicts will be an "avalanche" of individual cases seeking federal judicial interference in the delicate area of child welfare.

In this case, a sharply divided Seventh Circuit created sweeping substantive rights from a statutory provision, 42 U.S.C. § 671(a)(15), requiring the states, "in each case," to make "reasonable efforts" to prevent removal of children from their homes or to reunify families. That "reasonable efforts" clause is contained in Title IV-E of the AAA, 42 U.S.C. §§ 670-79a, a federal-state cooperative funding statute that reimburses states for certain "foster care maintenance payments" upon adoption of a state plan meeting statutory requirements.

Under the test set out by this Court in *Pennhurst,* 451 U.S. 1, and clarified more recently in *Wilder,* 110 S. Ct. 2510, the vague "reasonable efforts" clause is insufficiently specific to create individually enforceable rights, such as the right to immediate and

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[1]Respondents brought their claim under Section 1983 and directly through an implied private right of action under the AAA. In both instances, the inquiry turns on whether Congress intended to create privately enforceable rights. *Compare Wilder,* 110 S. Ct. at 2517 (Section 1983) *with Touche Ross & Co. v. Redington,* 442 U.S. 560, 575 (1979) (most important factor in evaluating proposed implied private right of action is congressional intent). For the same reasons that the AAA's "reasonable efforts" clause creates no enforceable rights, discussed below, the statute cannot be the basis for an implied right of action under the more stringent standard of *Cort v. Ash,* 422 U.S. 66 (1975). *Cf. Thompson v. Thompson,* 484 U.S. 174, 108 S. Ct. 513, 522 (1988) (Scalia, J., concurring) (Court has refused to imply private right of action in nine of eleven recent cases).

continuous assignment of a child welfare specialist asserted by respondents here. Moreover, the court below expanded that novel right still further by extending the AAA's protection to children residing at home, despite the fact that the states receive no federal funds with which to serve such children.

By simply addressing *Wilder's result*, the decision below fails to apply the *Wilder test* and conflicts directly with *Pennhurst*. The majority opinion evidences a confusion as to *Pennhurst*'s continued vitality after *Wilder*. Petitioners urge this Court to grant certiorari to clarify that *Wilder* does not cast doubt on *Pennhurst*, but instead reaffirms the cardinal principles that a vague statutory provision cannot create enforceable rights and that the courts will not imply private rights from a cooperative funding statute where the statute provides no federal dollars to fund such obligations.

Moreover, the Seventh Circuit opinion creates a conflict in the circuit courts. Although no court of appeals has fully discussed this precise issue, the Eighth Circuit has affirmed a district court decision in a slightly different context holding that Section 671(a)(15) does *not* create enforceable rights. *In re Scott County Master Docket*, 672 F. Supp. 1152 (D. Minn. 1987), *aff'd sub nom. Myers v. Scott County*, 868 F.2d 1017 (8th Cir. 1989) (adopting district court opinion and analysis); *see also Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 928 (8th Cir. 1987) (Title IV was "enacted to enable states to provide financial assistance to needy persons" and does not create enforceable rights).

The lower federal courts have also struggled with the issue, reaching strikingly different conclusions. In the Seventh Circuit alone, four district court judges were evenly split on the issue prior to the court of appeals decision in this case. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1401-02 (N.D. Ill. 1989) (Grady, C.J.) (reasonable efforts clause too "amorphous" to create enforceable rights) *and Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (Williams, J.) (same) *with Norman v. Johnson*, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990) (Hart, J.) (reason-

able efforts clause creates enforceable rights) *and Artist M,* App. 32a (N.D. Ill. 1989) (same).[2] These conflicting decisions evince a confusion in the lower courts as to the proper analysis for finding individually enforceable rights under Section 1983.

This Court should grant certiorari to resolve that uncertainty, which affects a substantial number of cases. Courts in several states are presently faced with "reasonable efforts" claims in Section 1983 actions. *See, e.g., Children ABCDEF v. Martinez,* No. 90-2416 (S.D. Fla. filed Oct. 1990); *M.E. v. Martinez,* No. 90-1008 (S.D. Fla. filed May 1990); *Baby Neil v. Casey,* No. 90-2343 (E.D. Pa. filed April 4, 1990); *LaShawn v. Dixon,* No. 89-1754 (D.C.D.C. filed June 20, 1989); *R.C. v. Hornsby,* No. 88-D-1170-N (M.D. Ala. filed Nov. 1988); *Del. A. v. Edwards,* No. 86-801 (E.D. La. filed January 1986). Moreover, the Seventh Circuit's erroneous analysis of Section 1983 will, if uncorrected, affect dozens of cases brought under spending-clause statutes each year. Review by this Court of the "reasonable efforts" issue will facilitate prompt resolution of these cases, by clarifying the governing legal principles for implication of enforceable rights from spending-clause statutes under Section 1983.

Without such clarification, the Seventh Circuit's holding will expose the states to massive financial obligations beyond the intended reach of the AAA and far beyond the scope of federal funding. That holding also will inject the federal courts into the minutiae of daily child welfare decision making, an area in which the federal courts have little knowledge or experience. Therefore, this Court should grant certiorari to clarify the proper scope of the AAA and Section 1983.

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[2]*See also Scrivner v. Andrews,* 816 F.2d 261, 263 (6th Cir. 1987) (recognizing enforceable procedural right to case plans and case reviews but not to meaningful visitation); *Winston v. Children & Youth Servs.,* 748 F. Supp. 1128, 1133 (E.D. Pa. 1990) (reasonable efforts provision does not create enforceable right to meaningful visitation); *R.C. v. Hornsby,* No. 88 D-1170-N, slip op. (M.D. Ala. Apr. 19, 1989) (finding enforceable rights under § 671(a)(15)).

I.

THE OPINION BELOW CONFLICTS WITH, AND HIGHLIGHTS THE NEED FOR CLARIFICATION CONCERNING, THIS COURT'S DECISIONS IN *PENNHURST* AND *WILDER*

In *Pennhurst*, 451 U.S. 1, this Court set limits on the otherwise unbridled power of the courts to create privately enforceable rights from federal-state cooperative funding statutes like the AAA. Those limits are essential to ensure that the states do not accept federal funds based on an agreement, or "contract," set out by Congress in the statute, only to have the courts transform that contract through creation of substantive individually enforceable rights never envisioned by Congress.

The Seventh Circuit's opinion in this case contravenes the restrictions set forth in *Pennhurst*. The majority's holding is based on an implicit assumption that this Court last term abandoned, or at least significantly reduced, *Pennhurst*'s authority in *Wilder*. That assumption is erroneous, and it leads to erroneous results. As Judge Manion's dissent recognizes, under *Pennhurst*, the AAA's "reasonable efforts" clause is too vague and amorphous to create enforceable rights. (App. 26a-27a).

As discussed fully in Part III, below, the Seventh Circuit's inability to reconcile *Pennhurst* and *Wilder* will, if left uncorrected, lead to a profound expansion of Section 1983 and to ever-increasing federal court intervention into areas of traditional state concern. That intervention is most troubling in this case, where the decision below allows every child who, under a state juvenile court order, is served by a state child welfare agency to sue the state in federal court any time the child (or his or her advocate) believes that the agency's efforts are not "reasonable." Without the boundaries set by *Pennhurst*, Section 1983 will become a vehicle for federalization of the child welfare system, a result absolutely unintended by the AAA's drafters, with disas-

trous consequences for the children and families involved. Those consequences in this case and a number of pending cases involving the AAA and other federal-state cooperative funding statutes make it necessary that the Court grant certiorari here to clarify the intended scope of *Wilder* and the continued strength of *Pennhurst*.

A. *Wilder* Reaffirmed *Pennhurst*, And The Opinion Below Conflicts With Both

By focusing solely on the result in *Wilder*, the Seventh Circuit's opinion in this case reaches a result that is flatly inconsistent with *Pennhurst* and misapplies the test for finding enforceable rights under Section 1983 set out in this Court's decisions. That test was clarified most recently in *Wilder* itself, 110 S. Ct. at 2517. *Cf. Dennis v. Higgins*, 59 U.S.L.W. 4117 (U.S. Feb. 20, 1991) (applying test in Commerce Clause case). Under *Pennhurst* and *Wilder*, a statute creates enforceable rights only if the statutory language is (i) mandatory *and* (ii) sufficiently specific so as not to be " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' " *Dennis*, 59 U.S.L.W. at 4120 (citations omitted); *see also Wilder*, 110 S. Ct. at 2517. The "reasonable efforts" clause of the AAA fails the second prong of that test.

In *Wilder*, this Court refined the analysis formulated in a series of opinions beginning with *Pennhurst*. As this Court held in *Pennhurst*, a federal-state cooperative funding statute like the AAA is

> in the nature of a contract; in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.

Pennhurst, 451 U.S. at 17. The Court emphasized: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accord-

ingly, if Congress intends to impose a condition on the grant of federal funds, it must do so unambiguously." *Id.*

The facts of *Pennhurst* illustrate this principle. In that case, this Court held that the asserted rights to "appropriate treatment" in the "least restrictive setting" were "largely indeterminate." *Id.* at 24. The Court noted:

> It is difficult to know what is meant by providing "appropriate treatment" in the "least restrictive" setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment. *The crucial inquiry, however, is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.*

Id. at 24-25 (emphasis added); *see also* App. 25a-26a (Manion, J., dissenting).

The Seventh Circuit majority here explicitly rejects this most important aspect of *Pennhurst* and fails to undertake the "crucial inquiry" required by this Court in that case and in *Wilder*. When Congress enacted the AAA, it chose to define certain terms specifically but provided no definition of or guidance concerning "reasonable efforts." *See* Part I(B)(1), below. The panel opinion discounts this fact, stating: "Congress is not required to spell out all rights intended to be created by a federal law merely because it chooses to spell out one." (App. 16a). Yet, if *Pennhurst* means anything, it means that Congress must spell out rights with sufficient specificity that the states know the contours of the bargain they are accepting.

The Seventh Circuit errs in attempting to distinguish *Pennhurst* solely on the basis that the "reasonable efforts" clause is mandatory. The majority opinion holds that *Pennhurst* is inapposite because the statutory provisions asserted in this case are "tied explicitly to the funding provision" of the AAA, in contrast to the terms of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010, construed in *Pennhurst*.

(App. 11a). However, petitioners do not dispute that the AAA's language is mandatory; the issue is whether the language is sufficiently *specific* to create enforceable rights.

The dissenting opinion below recognizes the majority's error in failing to confront the second *Pennhurst* requirement:

> As with the language in *Pennhurst*, the phrase "reasonable efforts" does not communicate or prescribe any specific set of practices which unambiguously notify Illinois of the conditions it must meet in order to receive federal help. "Reasonable efforts" is an indeterminate statement, to say the least. . . . Subsection (a)(15) directs the plan to include provisions that "*in each case,* reasonable efforts will be made. . . . " Since every case will be different, "reasonable efforts" cannot be the same. . . . Without proper congressional guidance we should refrain from inventing rights which interfere with the foster care system.

(App. 26a-27a (Manion, J., dissenting) (emphasis in original)). By rejecting *Pennhurst*'s specificity requirement, the panel majority makes the federal courts a "crisis administrator of child welfare" (App. 29a-30a (Manion, J., dissenting)), a result inconsistent with congressional intent and this Court's decisions.

The Seventh Circuit's result is most easily explained by an implicit assumption that *Wilder* somehow modified or overruled *Pennhurst*'s specificity requirement. But, in fact, *Wilder* reemphasized that "crucial inquiry." *See Wilder*, 110 S. Ct. at 2517. This Court, in *Wilder*, cited *Pennhurst* repeatedly with approval. *See id.* at 2517-19. Indeed, *Wilder* makes explicit what is only implicit in *Pennhurst*: in determining whether a statute is sufficiently mandatory and specific, the courts must undertake a searching analysis of the statutory language, legislative history, and the corresponding regulatory scheme. *Id.* at 2518.

In *Wilder*, the Court conducted a detailed review of the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396(a), and concluded that the Amendment created an enforceable right to "reasonable and adequate" reimbursement rates for health care prov-

iders. Crucial to the Court's decision was the fact that the statute required the state to measure its rates against an "objective benchmark" of an "efficiently and economically operated facility," thereby reducing any lack of specificity. *Id.* at 2522-23.[3] Likewise, the legislative history of the Amendment contained specific statements of an intent to create privately enforceable rights. *Id.* at 2520-21. In addition, the regulations implementing the Amendment set out factors that a state must consider in determining the method for calculating "reasonable" rates. *Id.* at 2522-23. Together, these factors led to a finding that Congress intended that the Amendment be privately enforced.

Instead of undertaking the "crucial inquiry" set out in *Pennhurst* and *Wilder,* the Seventh Circuit panel mechanically analogizes "reasonable efforts" to the "reasonable and adequate" reimbursement rates to health care providers at issue in *Wilder.* (App. 11a). The panel majority fails, however, to undertake the *analysis* required by *Wilder* and the majority's strained analogy ignores substantial differences in the statutory schemes. *See* Part I(B), below. Thus, the Seventh Circuit's confusion over the relationship between *Pennhurst* and *Wilder* leads the court to discard *Pennhurst*'s careful limits on federal court power to "invent" new rights and distort the enforceable-rights test set out by this Court's prior decisions.

B. It is Clear Under The Inquiry Required By *Wilder* And *Pennhurst* That The "Reasonable Efforts" Clause Does Not Create Enforceable Rights

As set forth above, the two-pronged test outlined in *Pennhurst* and *Wilder* requires that the courts divine congressional intent

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[3]By contrast, the Seventh Circuit's opinion in this case admits that, in enacting the AAA, Congress meant to give the states "*substantial discretion* in choosing the method of implementation." (App. 12a (emphasis added)). As discussed in Part I(B), below, that "substantial discretion" distinguishes the "reasonable efforts" clause from the Boren Amendment considered in *Wilder* and brings this case directly within the ambit of *Pennhurst.*

from an examination of the statutory structure, legislative history, and regulatory framework. *See, e.g., Wilder*, 110 S. Ct. at 2518. If the Seventh Circuit had not strayed from the "crucial inquiry" required by this Court, the court would have found that the "reasonable efforts" clause lacks the required specificity to create individually enforceable rights. The AAA does not contain the required detailed statutory directive, legislative history indicating Congress' intent to create specific, enforceable rights, and regulatory framework providing the states with definition and guidance as to what Congress meant by "reasonable efforts."

1. Statutory Structure

Perhaps the most powerful evidence that the "reasonable efforts" clause is too vague to be judicially enforced is the AAA itself. In *Wilder*, this Court found that the requirement of "reasonable and adequate" reimbursement rates was sufficiently precise because the statute itself required the state "to judge the reasonableness of its rates against the objective benchmark of an 'efficiently and economically operated facility.' " *Wilder*, 110 S. Ct. at 2522-23.[4]

[4]This Court in *Wilder* noted that the Boren Amendment provided more guidance than the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1437a, which was held enforceable in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). In *Wright*, the Court found that the Brooke Amendment created an enforceable right to a "reasonable" rent allowance, in part because the implementing regulations set out guidelines to determine that allowance. *Id.* at 432.

As in *Wilder*, *Wright* involved a *monetary* calculation that was easily determined based on prevailing rates in the market. By contrast, there is no single "reasonable" child welfare practice. The area is one of complex problems and individualized determinations not capable of reduction to a formula or "benchmark." *See* App. 24a (Manion, J., dissenting) ("A state's duty to exert 'reasonable efforts' in general does not suggest any particular obligation. In contrast, a court can easily determine and enforce a state's obligation to establish 'reasonable' reimbursement rates, or provide for 'reasonable' utility allowances. . . .").

In drafting the AAA, Congress did not even *attempt* to formulate an "objective benchmark" like that in *Wilder*. Instead, the statute requires that "reasonable efforts" be determined on a case-by-case basis. *See* § 671(a)(15) ("*in each case,* reasonable efforts will be made"). Rather than establishing a specific requirement tied to an objective benchmark, Congress intentionally chose vague language and specifically acknowledged that "reasonable efforts" vary based on the facts of each individual case. *See* App. 27a (Manion, J., dissenting).

Indeed, the AAA never defines or limits "reasonable efforts" in any respect.[5] An analysis of the AAA's overall statutory structure demonstrates that Congress was capable of being specific and detailed when it so intended. In contrast to the ambiguity surrounding the "reasonable efforts" clause, Congress set out specific, detailed definitions of the "case plan" and "case review system" required under Section 671(a)(16). *See* 42 U.S.C. § 675(1), (5). The heart of this Court's holding in *Pennhurst* is the premise that Congress must speak so clearly that "we can fairly say that the state could make an informed choice." *Pennhurst*, 451 U.S. at 25. Congress' refusal to provide a clear directive as to "reasonable efforts" is a powerful indication that neither Congress nor the states envisioned that the statute created an enforceable right to reasonable efforts.

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[5]Because the AAA contains no specific definition or regulations defining "reasonable efforts," the court of appeals and district court in this case improperly determined what Congress intended by the term "reasonable efforts" by reference to DCFS's own voluntary actions. The Seventh Circuit latched onto the fact that "DCFS chose to use caseworkers" (App. 11a) to justify a *requirement* that DCFS assign caseworkers immediately and continuously to all court cases. That "requirement," and indeed the very concept of caseworkers, appears nowhere in the AAA. In fact, the Seventh Circuit's mode of analysis leads to the anomalous result that *federal* law creates different rights in different states, a result directly contrary to the "contract" theory of *Pennhurst.*

2. Legislative History

In *Wilder,* this Court cited extensive legislative history showing that Congress intended to enact a specific requirement for reasonable and adequate reimbursement rates and that Congress had explicitly and repeatedly stated that it intended for Medicaid providers to retain the right to sue state agencies. *See Wilder,* 110 S. Ct. at 2520-22. By contrast, the legislative history of the "reasonable efforts" clause strongly supports petitioners' claim that Congress never intended to create an enforceable right to reasonable efforts; rather, it is apparent from the legislative history that Congress meant to *encourage* rather than *mandate* the provision of preventive and reunification services.[6] *Cf. Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health & Human Servs.,* 798 F.2d 57, 59 (2d Cir. 1986) (AAA creates "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system"), *cert. denied,* 479 U.S. 1064 (1987). As the Seventh Circuit dissent notes: "Incentives in this case do not create rights and binding obligations." (App. 27a (Manion, J., dissenting)).

The House Ways and Means Committee Report on the AAA specifically stated:

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[6]*See* 125 Cong. Rec. 22683 (Aug. 3, 1979) (remarks by Sen. Cranston) ("Under the fiscal constraints proposed in the ceiling to be imposed by this legislation, States will be encouraged to place in foster care only those children whose removal from their families is clearly necessary."); 125 Cong. Rec. 22692 (Aug. 3, 1979) (remarks by Sen. Moynihan) ("Insofar as it is within the limited abilities of the Federal Government to encourage the return of youngsters to their homes or their adoption, our policies should be so shaped"); S. Rep. No. 336, 96th Cong., 2d Sess. ("S. Rep.") 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News ("USCCAN") 1448, 1450 ("the incentive structure of present law is modified to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes"); S. Rep. at 16, *reprinted in* 1980 USCCAN at 1466 (recognizing that progress in restructuring foster care system "cannot be achieved by 'Federal fiat,' but only through state governments, "which have primary responsibility for these programs").

> The Committee recognizes that the entire array of possible preventive services are not appropriate in all situations. *The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child.*

H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) (emphasis added). It is clear from this statement that Congress intended for the states to retain the flexibility to determine what efforts should be made in each case, rather than to create a federal judicially-enforceable right to "reasonable efforts."

3. Regulatory Framework

This Court's decisions also direct the courts to look to the regulatory framework of the statute for additional guidance and definition. For example, in *Wright,* the Court found that the implementing regulations set out specific guidelines for housing authorities to follow to determine a reasonable utility allowance, thereby creating a sufficiently specific and definite right. *Wright,* 479 U.S. at 432; *see also Wilder,* 110 S. Ct. at 2522-23 & n.17.

The regulations implementing the AAA, 45 C.F.R. § 1357.15(e)(2), which the Seventh Circuit only briefly mentions, do nothing more than list examples of the type of preventive or reunification services that the states *may* provide. The regulations themselves state that the list is not meant to be all-inclusive. *Id.* They give the states no guidance as to which services constitute "reasonable efforts" in any particular case. Again, such regulations in no way make the "reasonable efforts" clause more specific.

The Seventh Circuit's failure to undertake the "crucial inquiry" required by *Wilder* and *Pennhurst* thus led the Court to the wrong result in this case. The court's holding and paucity of analysis evince a need for clarification by this Court that *Pennhurst* survives *Wilder* intact, and that the courts must undertake a detailed analysis of statutes when confronted with offers to create expansive new rights from congressional silence.

II.

THE SEVENTH CIRCUIT OPINION CONFLICTS WITH *PENNHURST* BY HOLDING THAT THE AAA CREATES ENFORCEABLE RIGHTS ON BEHALF OF CHILDREN FOR WHOM STATES RECEIVE NO FEDERAL FUNDS UNDER TITLE IV-E

As discussed in Part I, one of *Pennhurst*'s central concepts is the notion that federal-state cooperative funding statutes are "contracts." As this Court described the contract, "*in return for federal funds,* the State agrees to comply with federally imposed conditions." *Pennhurst,* 451 U.S. at 17 (emphasis added). In this case, however, the Seventh Circuit discards that fundamental principle and creates enforceable rights on behalf of a class of citizens for whom the states receive not one dollar of federal reimbursement under Title IV-E of the AAA. This Court should grant certiorari to emphasize that, in the case of federal-state cooperative funding statutes, there are no rights without fiscal support.

In one brief paragraph, the court of appeals extends an enforceable right to "reasonable efforts" to children residing at home, for whom the state receives *no* federal Title IV-E funds.[7] (App. 18a). Section 671(b) of the AAA provides that states may receive reimbursement for "*foster care maintenance payments*" in return for meeting the requirements, including "reasonable efforts," set forth in Section 671(a). Those payments are made only on behalf of children who reside in a "child care institution" or a "foster

[7]That holding for the first time extends rights under the AAA beyond children in state custody.

family home." *See* § 672(b). The statute's implementing regulations explicitly limit "foster family home" to children living outside of the home. 45 C.F.R. § 1355.20 (foster family home "provides 24-hour *out-of-home* care for children" (emphasis added)). Thus, the state receives no federal funds under Title IV-E for providing services to children in their own homes.

Nonetheless, the Seventh Circuit holds that such children have enforceable rights under Title IV-E. That holding conflicts directly with the *Pennhurst* requirement that the court consider whether the state receives federal funds in determining whether Congress meant to create enforceable rights:

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting § 6010. *When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs.*

Pennhurst, 451 U.S. at 24.[8]

The Seventh Circuit refuses even to acknowledge this aspect of *Pennhurst,* thereby creating a situation where federal courts may infer that Congress created rights on behalf of people for whom the states receive no federal dollars. If that holding is correct, then the bedrock foundation of enforceable-rights law—that spending-clause statutes are contracts imposing specific obligations in return for funding those obligations—has been fundamentally altered. Nothing in *Wilder* compels such a result, and this Court should grant certiorari to clarify that plaintiffs may not ask the judiciary, in the guise of enforcing federal funding statutes through Section 1983, to force states to fund what Congress has not.

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[8]Indeed, this Court in *Wilder* also recognized the importance of considering the amount of federal funds a state receives, noting that "the Federal Government provides funds to cover between 50% and 83% of the cost of patient care." 110 S. Ct. at 2518 n.10.

III.

SUPREME COURT REVIEW IS NECESSARY TO CLARIFY THE EFFECT OF *WILDER* ON THIS COURT'S PRIOR RULINGS AND TO PREVENT A VAST, UNINTENDED EXPANSION OF FEDERAL INTRUSION INTO STATE CHILD WELFARE DECISIONS

As discussed at length above, the Seventh Circuit's decision in this case evidences an apparent confusion as to the scope of the recent *Wilder* decision. Specifically, the Seventh Circuit majority reads *Wilder* as having greatly reduced the precedential force of *Pennhurst*, this Court's leading case on Section 1983 enforceable rights. As discussed earlier, such an interpretation is inconsistent with *Wilder* itself, which cites *Pennhurst* approvingly.

Moreover, such a reading of *Wilder* creates a vast expansion of federally enforceable rights. *Pennhurst* placed clear limits on the ability of federal courts to impose massive financial burdens on the states in the guise of construing federal spending-clause statutes. Specifically, if a court wishes to infer that Congress intended to allow individual enforcement, the court must examine "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Pennhurst*, 451 U.S. at 24-25. Likewise, the absence of federal funding for a purported "right" rebuts any inference that Congress intended to create that right. *Id.* at 24.

The Seventh Circuit majority in this case turns *Pennhurst* on its head. No longer does Congress have to define terms with some degree of specificity, so that the states may understand the "contract" they enter when accepting federal reimbursement. No longer does Congress even have to provide a penny of federal funding in order for courts to create enforceable rights from a spending-clause statute.

Judge Manion, in dissent, illuminates the unprecedented scope of the majority's opinion:

> The right that we have created in this opinion will allow every child, by his next friend, to challenge the reasonable efforts of the caseworker . . . . With this court's approval of the district court's finding that each of these children have an individual enforceable right to challenge the reasonable efforts of the DCFS, we can anticipate an avalanche of lawsuits seeking to obtain specific social services and mandatory injunctions governing every imaginable detail over the operation of the DCFS. Clearly this is far beyond the intent of Congress.

(App. 29a (Manion, J., dissenting)).

By abolishing *Pennhurst's* sound restrictions *sub silentio*, the court of appeals removes virtually all constraints upon the power of federal courts to "invent[ ] rights" from congressional silence. *See* App. 27a (Manion, J., dissenting). The federal courts may now effectively rewrite statutory agreements between Congress and the states, without any indication that either party intended or foresaw that outcome. Nothing in *Wilder* compels that result. The Court should grant certiorari in this case to reaffirm the tenets of *Pennhurst* and reestablish the limited scope of federal court power to create sweeping rights almost from whole cloth.

Such clarification is especially necessary in this case, where the court of appeals' decision may have disastrous consequences for the states and the children they serve. As the dissent below notes, the Seventh Circuit's decision makes the federal courts the "crisis administrators of child welfare" (App. 29a-30a (Manion, J., dissenting)), and will create an "avalanche" of individual federal lawsuits seeking substantive child welfare services (App. 29a).

That "avalanche" is one for which the federal courts are wholly unprepared and ill-suited. In *DeShaney v. Winnebago County De-*

partment of Social Services, 812 F.2d 298 (7th Cir. 1987), *aff'd,* 109 S. Ct. 998 (1989), Judge Posner recognized:

> [T]he proposition that by once assuming custody of a child a state becomes obligated by federal law to act with some minimum competence in overseeing the child's welfare would if accepted inject the federal courts into an area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts . . . than by the state judicial and administrative authorities.

Id. at 304.

By misreading *Pennhurst* and *Wilder*, the court below creates the proverbial loose cannon, slashing to and fro without aim, upsetting both the careful federalism of the AAA's incentive funding structure and the delicate balance of child welfare decision making. This Court should grant certiorari to clarify that *Pennhurst* survives *Wilder*, right the wrong done in this case, and prevent such mistakes in the future.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners Sue Suter and Gary T. Morgan respectfully ask that this Court grant the writ of certiorari, vacate the opinion of the United States Court of Appeals for the Seventh Circuit, and remand for dismissal of the case.

Respectfully submitted,

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Dated: March 20, 1991